FOR ARGUMENT

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No. 78-808

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, APPELLANT

v.

NORMAN J. BOLES AND MARGARET GONZALES, AND ALL OTHERS SIMILARLY SITUATED, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF APPELLEES

HERBERT SEMMEL
NANCY DUFF CAMPBELL
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

Attorneys for Appellees

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court is unreported and is set forth as Appendix B to the Jurisdictional Statement, J.S. App. 3a-28a.

QUESTIONS PRESENTED

1. Does Section 202(g) of the Social Security Act violate the equal protection component of the Due Process Clause by denying the protection of Mother's Benefits to all illegitimate children living with their mother, regardless of dependency, while granting the protection to all legitimate children identically situated?

2. Does the Social Security Act authorize the District Court to award retroactive benefits to the named plaintiffs when there has been an incorrect denial of benefits resulting from application of an unconstitutional condition on benefits?

3. Where the action did not seek recovery of Social Security benefits for members of the class, did the District Court have authority to award class relief limited in effect to a notice to class members of the removal of the unconstitutional marriage requirement?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 204(a) of the Social Security Act provides in pertinent part:

(a) Whenever the Secretary finds that more or less than the correct amount of payment

has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) . . .

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person . . .

[Other provisions are reproduced in Appellant's Brief at 2-5.]

STATEMENT

Mother's Insurance Benefits [hereinafter Mother's Benefits] are provided under Section 202(g) of the Social Security Act, 42 U.S.C. §402(g), to provide the surviving child of a deceased worker with the opportunity to receive the care of his or her surviving parent. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). However, the statute restricts Mother's Benefits to families in which the child is in the care of the surviving wife or surviving divorced wife of the father, the wage earner. This marriage requirement for the caretaker parent excludes from benefits all families containing illegitimate children living with their mothers, even if the father was living with and supporting the children and mother at the time of his death. All identically-situated families with legitimate children living with their mothers are eligible, regardless of actual dependency on the father. [1]

[1] All families must additionally meet the other requirements for Mother's Benefits, which are that the woman be not married, be not otherwise entitled to an equal or greater Social Security benefit, and have [Footnote continued on next page]

As the District Court found, all of the requirements for Mother's Benefits have been met by the named appellees, Margaret Gonzales and her son, Norman J. Boles, except that appellee Gonzales was never married to the deceased wage earner, Norman W. Boles. J.S. App. 5a-6a. Mr. Boles lived with appellee Gonzales from February 1963 until sometime in 1966. The offspring of their relationship is Norman J. Boles, born October 29, 1974. Norman J. Boles is receiving Child's Insurance Benefits [hereinafter Children's Benefits] under the Act, §202(d), 42 U.S.C. §402(d), and is in the care of his mother. He is the acknowledged child of the deceased wage earner.

After exhausting administrative remedies, appellees filed suit in the United States District Court for the Western District of Texas. The District Court held that the marriage requirement for Mother's Benefits unconstitutionally discriminates against illegitimate children.

[Footnote continued from preceding page] in her care a child of the wage earner entitled to Children's Benefits, 42 U.S.C. §402(g)(1)(A),(B),(C),(E). In the case of divorced wives, the child must be her own and that of the wage earner. 42 U.S.C. §402(g)(1)(F).

The District Court certified a class of "all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. §402(g)(1) restricts such benefits to women who were once married to the fathers of their children." J.S. App. 1a-2a. The District Court enjoined the Secretary from denying benefits to the class solely because of the marriage requirement. Payment of retroactive benefits was ordered only to the individual appellees. As to the class, the suit did not seek nor did the Court order payment of benefits.[2] The Court did order the Secretary to notify "all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits." J.S. App. 25a. To actually receive benefits, all class members would still have to apply for benefits and meet all other eligibility requirements.

2 The complaint was amended to delete any request for payment of benefits to the class. The motion to amend is reprinted in Appellant's Brief, Appendix B, pp. 3a-4a.

SUMMARY OF ARGUMENT

I.

The statutory provision on Mother's Benefits, Section 202(g), discriminates against illegitimate children because Mother's Benefits are provided only to families in which the mother was married to the child's deceased father. All legitimate children living with their mothers receive the protection of Mother's Benefits, but all illegitimate children in the same circumstances are denied that protection without regard to whether the father was supporting the mother and child. The discrimination at issue here, based on a requirement of marriage of the parents, is precisely the type which this Court has declared unconstitutional in the last eleven years.

Section 202(g) is part of a legislative scheme which discriminates on the basis of illegitimacy. Congress once excluded illegitimates from Social Security benefits; now it provides some benefits but hedges them with a series of discriminatory provisions. That a miniscule fraction of illegitimate children - those living with their father's widow rather

than their mothers - may receive the protection afforded by Mother's Benefits, does not save the constitutionality of the statute. Almost all illegitimate children live with their mothers and are denied benefits. This Court's holdings clearly demonstrate that discrimination against a subclass of illegitimates may be unconstitutional even though some illegitimates do not suffer from that discrimination. See, e.g., Weber v. Aetna Casualty & Surety Co., 406 U.S. 164.

The standard for constitutional review of a classification based on illegitimacy is whether it bears a substantial relation to the governmental interest it was designed to serve. Lalli v. Lalli, No. 77-1115 (Dec. 11, 1978), plurality slip op. at 8. As the requirements for benefits and the legislative history make clear, the purpose behind Mother's Benefits is to provide children with the opportunity for the personal attention of the surviving mother by relieving to some extent the need for her to go to work outside the home. This Court so held in Weinberger v. Wiesenfeld, 420 U.S. 636. Such purpose is not served by a marriage requirement which

denies benefits to all illegitimate children living with their mothers, regardless of actual dependency, and grants the benefits to all legitimate children similarly situated. Even if the father has no other dependents and was living with and supporting his illegitimate child and the child's mother every day of the child's life until the father's death, Mother's Benefits are unavailable to the family.

The absolute bar to a class of illegitimate children on benefits granted legitimate children is the clearest case of discrimination without any rational basis. The contrast between the two Social Security cases involving illegitimates in which this Court has written opinions illustrates the point. Contrast Jimenez v. Weinberger, 417 U.S. 628, with Mathews v. Lucas, 427 U.S. 495. Unlike Jimenez and this case, the disfavored class in Lucas had the opportunity to qualify for benefits by proving dependency. Thus a classification based on likelihood of support is invalid if it does not permit families with illegitimate children to prove support, while presuming support for others. It is unconstitutional if it totally bars benefits to illegitimates, many of whom have been supported by the deceased father.

Such an absolute bar is certainly not "carefully tuned to alternative considerations" as required by this Court. Mathews v. Lucas, 427 U.S. at 513.

II.

As the Secretary concedes, Section 204 (a) of the Social Security Act authorizes the courts to order the Secretary to pay retroactive benefits when a person has been paid "less than the correct amount." 42 U.S.C. § 404(a). The section contains no distinction between constitutional and statutory reasons for a payment that is less than correct. Moreover, the provision of the Act providing for judicial review of denial of payments, 42 U.S.C. § 405(g), treats constitutional and statutory claims alike. Weinberger v. Salfi 422 U.S. 749, 762 (1975). There is no reason to read into the authorization for an award of retroactive benefits an exception applicable to an applicant who meets every constitutionally valid eligibility requirement but has been denied benefits because of an unconstitutional eligibility requirement.

III.

The class relief awarded by the District Court was limited in effect to a notice to

all illegitimate children already receiving Children's Benefits and their mothers that they are no longer ineligible for Mother's Benefits solely by reason of the unconstitutional marriage requirement. The class relief does not require the payment of benefits but simply advises the class members that they may apply for benefits. Each class member will still have to demonstrate compliance with all valid eligibility requirements by filing a separate claim for benefits under the regular procedures of the Social Security Administration.

Notice to the class is necessary to prevent the continued loss of benefits to thousands of primarily low-income families who have previously been advised by the Social Security Administration that they are not eligible for Mother's Benefits. Without notice, these families will have no way of learning that they may now apply for benefits, and payment can be made only after an application has been filed. 42 U.S.C. § 402(g)(1)(D).

Since the District Court did not order the payment of benefits, Section 205(h) of the Act, 42 U.S.C. § 405(h), did not preclude the District Court's jurisdiction

under 28 U.S.C. § 1331 to award relief limited to a notice. The limitations on the jurisdiction of the District Court imposed by Section 205(h) as interpreted in Weinberger v. Salfi, 422 U.S. 749, apply only to claims for benefits, i.e., to those claims where judicial review is available under Section 205(g), 42 U.S.C. § 405(g). Mathews v. Eldridge, 424 U.S. 319. The courts have not hesitated to find Sections 205(g) and (h) inapplicable or the exhaustion requirements waived where necessary to remedy a constitutional violation or prevent an inequitable forfeiture of benefits. See, e.g., Mathews v. Eldridge, supra; Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976). These considerations prevail here. Affirmance by this Court on the merits will be a hollow victory for tens of thousands of families who will never learn of their right to benefits if notice to the class is not required of the Secretary.

If Section 1331 does not afford jurisdiction for notice to the class, then Section 205(g) of the Social Security Act must. The only reason that Section 1331 might not be available is that the request for the relief granted to the class constitutes a claim under the Social Security Act. Such claims are

reviewable under Section 205(g) if administrative remedies have been exhausted or exhaustion is not required. Under Mathews v. Eldridge, 424 U.S. 319, the only non-waivable requirement is the filing of a claim for benefits, and that has been met here by all members of the class. Since all families in the class are already receiving Children's Benefits, it is apparent that on the death of the father a claim for Social Security benefits was filed by each class member. That in some cases the application form used may have only referred to Children's Benefits and not Mother's Benefits is the responsibility of the Social Security Administration which advised the applicants that they were eligible only for Children's Benefits. As far as the applicants were concerned they claimed whatever benefits they were eligible for on the account of the deceased wage earner.

The remaining steps in the administrative process need not be exhausted. Exhaustion is waived where, as here, the Secretary concedes that there are no factual disputes and only a constitutional claim is presented. Mathews v. Diaz, 426 U.S. 67. In addition, exhaustion is unnecessary where there is no

direct claim for benefits and the delay involved would cause irreparable harm. Such harm is apparent here, for without notice many members of the class will never learn of their rights and others will learn only after years of delay.

ARGUMENT

I

THE SOCIAL SECURITY ACT VIOLATES THE EQUAL PROTECTION COMPONENT OF THE DUE PROCESS CLAUSE BY DENYING THE PROTECTION OF MOTHER'S BENEFITS TO ALL ILLEGITIMATE CHILDREN LIVING WITH THEIR MOTHER, REGARDLESS OF DEPENDENCY, WHILE GRANTING THE PROTECTION TO ALL LEGITIMATE CHILDPEN IDENTICALLY SITUATED

A. Section 202(g) Discriminates on the Basis of Illegitimacy

1. The marriage requirement of Section 202(g) constitutes discrimination on the basis of illegitimacy

Section 202(g) plainly draws a distinction on the basis of illegitimacy. By design and in fact, illegitimate children are denied benefits routinely available to legitimate children. Under the Act, Mother's Benefits are afforded to families in which the mother was married to the child's deceased father but not to families in which the parents were not married. The result is that all legitimate children living with their mothers receive the protection of Mother's Benefits, but all illegitimate children in the same circumstances are denied that protection. Indeed, even when the deceased father

lived with his illegitimate child and the mother every day of the child's life until the father's death, the family is denied Mother's Benefits. In contrast, as the Court below noted, legitimate children receive the protection of Mother's Benefits even if their father deserted their mother before their birth and never supported them. J.S. App. 10a. The legislative message is clear: the only children who deserve the opportunity for the care of their mothers that Mother's Benefits afford are those who are legitimate. The classification of section 202(g) gives actual effect to this message.

Moreover, these disparate effects on illegitimate children, which result from the marital requirement of Section 202(g) limiting benefits to families headed by the wives and divorced wives of the deceased wage earner, cannot pass constitutional muster under a long line of Supreme Court cases. The discrimination at issue here, based on a marital requirement, is precisely the type which this Court has repeatedly declared unconstitutional in

the past eleven years. [3] This Court has also repeatedly emphasized that a marital requirement is the touchstone of unconstitutional discrimination against illegitimate children. In Gomez v. Perez, 409 U.S. 535, 538 (1973), for example, the Court held that a statute that afforded children a judicially enforceable right of support against their fathers only if their parents were married

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3 This Court in a series of cases beginning with Levy v. Louisiana, 391 U.S. 68 (1968), has repeatedly struck down statutes denying benefits to a class of illegitimates and granting the same benefits to legitimates solely because of the failure of the parents to marry. Thirteen cases relating to disparate treatment of illegitimate children have been decided. The first eleven cases are collected in the twelfth, Trimble v. Gordon, 430 U.S. 762, 766 n. 11 (1977). The thirteenth case is the recent decision in Lalli v. Lalli, No. 77-1115 (Dec. 11, 1978). Ten struck down the treatment as unconstitutional, and all ten involved total exclusion of a class of illegitimate children. One of the other three cases, Labine v. Vincent, 401 U.S. 532 (1971), has been effectively overruled by Trimble v. Gordon, 430 U.S. at 776 n.17. The two remaining decisions upholding disparate treatment of illegitimates involved procedural differences requiring illegitimate children to prove paternity or support, but did not result in the denial of benefits to those who could furnish the proof. Lalli v. Lalli, supra; Mathews v. Lucas, 427 U.S. 495 (1976). See discussion infra pp. 43-50.

"invidiously discriminate[s] against illegitimate children by denying them substantial benefits accorded children generally." Similarly, in New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619, 621 (1973), which involved a challenge to a state statute that granted public assistance only to families with children in which the adults were ceremonially married to each other, the Court upheld the argument that "...although the challenged classification turns upon the marital status of the parents as well as upon the parent-child relationship, in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." Most recently, in Trimble v. Gordon, 430 U.S. 762, an Illinois inheritance statute was determined to be "constitutionally flawed because, by insisting upon not only an acknowledgement by the father, but also the marriage of the parents, it excluded 'at least some significant categories of illegitimate children....'" Lalli v. Lalli, No. 77-1115, plurality slip op. at 6, citing

Trimble, 430 U.S. at 771. Indeed, the fact that "...the marital status of the parents is irrelevant," was a basis for distinguishing Lalli from these prior cases, and for the Court's holding there that a requirement that the paternity of the father be declared in a judicial proceeding before his death does not invidiously discriminate against illegitimates. This Court's precedents thus make clear that the marriage requirement of Section 202(g) establishes a classification based on illegitimacy. [4]

2. Section 202(g) is part of a statutory scheme which discriminates on the basis of illegitimacy

The legislative history of the Social Security Act further reveals that Section 202(g) discriminates against illegitimates, and in fact is part of a set of provisions adopted by Congress which deny benefits to illegitimate children. As appellees discuss

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4 As the District Court fittingly dispensed with the argument that the classification is not based on illegitimacy:

> Under the defendant's [Secretary's] argument, all Illinois has to do is amend its statute to provide that intestate inheritance from the father

[Footnote continued on next page]

below, infra pp. 36-43, Mother's Benefits are designed to assist children by providing the means for the surviving parent to remain in the home to care for the child.

The Social Security Act first provided for Survivors' Benefits in 1939. Social Security Amendments of 1939, Pub. L. No. 76-379, §202, 53 Stat. 1360. Children of deceased or retired wage earners were included in the beneficiary groups, but illegitimate children were effectively excluded from eligibility for Children's Benefits by a statutory requirement that family relationships, including an individual's status as a "child" for purposes of Children's Benefits, were to be determined according to the law concerning the devolution of intestate personal property of the state in which the insured wage earner was domiciled. Because illegitimate children could not inherit their

[Footnote continued from preceding page]
is granted only to a child "whose mother was married to his father" and the result in Trimble would be overturned. Illegitimate children would not inherit, but defendant would describe the result as constitutional because the statute was now facially neutral.
J.S. App. 23a.

father's intestate personal property under the law of virtually all states,[5] they were not "children" for purposes of eligibility for Children's Benefits.

The Social Security Board, which originally administered the insurance benefits under Title II, recognized as early as 1940 that these eligibility provisions created an inequitable situation for illegitimate children. In its first annual report after the Survivors' Benefits provision became effective, the Board stated:

> It was hoped that an interpretation of the conditions to be met in establishing a child's dependency under the amended act might be made which would obviate the necessity for consulting the law of the wage earner's domicile in determining the inheritance rights of illegitimate children. However, no legal authorization could be found for determining an illegitimate child's entitlement to benefits without applying the provisions of the act which make eligibility conditional upon the inheritance right of the child under State law.

5 See, e.g., J. Madden, Handbook of the Law of Persons and Domestic Relations, §105 (1931). Most states still maintained such restrictions when this Court decided Trimble v. Gordon, 430 U.S.762.

Fifth Annual Report of the Social Security Board 41 (1940).

Despite repeated recommendations by the Social Security Board, see, e.g., Annual Reports of the Social Security Board, 1945, p. 41, and 1946, p. 463, it was not until 25 years later, in 1965, that Congress amended the Social Security Act to provide that an illegitimate child could receive Children's Benefits if the child was acknowledged in writing by the parent, was decreed by a court to be the insured wage earner's child, was the subject of a court order for support, or was otherwise shown to be living with or supported by the insured wage earner. Social Security Amendments of 1965, Pub. L. No. 89-97, §339, 79 Stat. 286. Even then, as an indication that Congress continued to attach a stigma to the lack of marriage of the parents, Section 202(d)(3) of the Act was also amended to provide that children whose parents had entered into an invalid ceremonial marriage would be deemed "legitimate" and thus relieved of any requirement to prove dependency for the purpose of eligibility for Children's Benefits.

Pub. L. No. 89-97, §339(b), 79 Stat. 286, codified at 42 U.S.C. §402(d)(3).

In addition, Congress in 1967 added a provision indicating that it continued to regard illegitimates as second class citizens. The Social Security Amendments of 1967 included an amendment to Section 203(a) of the Act,[6] which provides for the reduction of benefits when the total benefits on an account of a wage earner exceed the statutorily-imposed maximum. Prior to the amendment, reductions were applied on a pro rata basis to all recipients of benefits from a particular wage earner. The 1967 amendment required that such reductions would thereafter first be applied to reduce the benefits payable to illegitimate children, without any reduction of benefits for legitimate children or other recipients. Social Security Amendments of 1967, Pub. L. No. 90-248, §163(a)(1), 81 Stat. 821 (1968). Congress rejected an alternative provision introduced in the Senate, under which the benefits of other family members would simply not have been reduced if the family

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[6] 42 U.S.C. §403(a).

contained eligible illegitimate children, and opted for the House version, under which benefits for illegitimates would first be reduced and even eliminated.[7] S. Rep. No. 90-744, 90th Cong., 1st Sess. 94 (1967); Conference Report, H.R. Rep. No. 90-1030, 90th Cong., 1st Sess. 18-19 (1967).[8]

7 This discriminatory treatment of illegitimates is in marked contrast to Congressional action regarding maximum benefits when Congress added a different class of beneficiaries, divorced spouses, as recipients of Social Security benefits. In this latter case, Congress added a provision, still in effect, that no reduction of benefits shall occur if the maximum benefits on the account of a wage earner is exceeded solely due to entitlement to benefits on the part of a divorced spouse or surviving divorced spouse. Social Security Amendments of 1965, Pub. L. No. 89-97, §308(d)(6), 79 Stat. 286, codified at 42 U.S.C. §403(a)(3)(C).

8 This Court in 1972 affirmed two decisions declaring that this provision unconstitutionally discriminated against illegitimate children. Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069 (1972); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069 (1972).

In sum, Congress evidenced a clear pattern of conditioning benefits for children upon their legitimacy. As the District Court correctly concluded, the history of the Act demonstrates that although Congress has now provided benefits to illegitimate children, those benefits have consistently been "hedged... with a series of discriminatory provisions...[t]he last vestige of [which] now appears to be before this Court." J.S. App. 24a.

3. The Secretary's arguments that Section 202(g) does not discriminate against illegitimate children are unconvincing

Against this clear demonstration of discrimination against illegitimates in both the statute's language and legislative history, the Secretary poses two arguments. First, although he concedes that "it is usually marriage that defines the difference between legitimacy and illegitimacy," Appellant's Brief at 13, he claims that the marriage requirement does not discriminate against illegitimate children because they theoretically may be cared for by their

father's wife and Congress chose to give these widows "the option to remain home to care for the entitled child." Id. at 19. This argument, however, totally ignores the actual effect that the marriage requirement has on illegitimate but not legitimate children. It is beyond dispute that most children whose parents are not married live with their natural mothers, not their fathers' wives. Hence, for illegitimate children living with their mothers to obtain the opportunity for care offered by Mother's Benefits, they would have to leave the home of their natural mother and live with their father's wife, hardly a realistic option. Legitimate children living with their mothers are not faced with the necessity of such a drastic change in their living arrangements, for they are living with the woman who is also their father's wife. An argument that asserts that illegitimate children must leave the home of their mother to have the opportunity for "parental" care demonstrates that the marriage requirement excludes almost all illegitimate children from Mother's Benefits.

This Court has not hesitated to recognize the fact of discrimination against illegitimates in analogous circumstances. Thus, in Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), the Court rejected an argument that unacknowledged illegitimates were not discriminated against because some of them could qualify for equal workers' compensation benefits if their father acknowledged them. The Court noted that "the acknowledgement so necessary to equal recovery rights may be unlikely to occur or legally impossible to effectuate [9] even where the illegitimate child may be nourished and loved." Id. at 174. In Trimble v. Gordon, 430 U.S. 762, this Court rejected an argument that the intestacy statute did not discriminate against illegitimates in inheritance because the

[9] Under Louisiana law, a father could acknowledge his illegitimate child by following certain procedures. However, if the father was married at time of conception, acknowledgement was ineffective unless the father later legally married the child's mother. 406 U.S. at 167 n.3.

father could always leave his property to his illegitimate children by will, 430 U.S. at 766. In New Jersey Welfare Rights Organization v. Cahill, the Court rejected an argument that strengthening family life justified limiting welfare benefits to husband-wife-child nuclear families when "in practical effect it operates almost invariably to deny benefits to illegitimate children while granting benefits to those children who are legitimate." 411 U.S. at 619-620. In that case, as here, a minuscule fraction of illegitimates could qualify for benefits, if they were living with their father and were adopted by his wife. The likelihood of that event is equal to the likelihood here that illegitimate children will leave their mother after the death of their father to live with his widow.

The Secretary's second argument is that this case does not involve discrimination against illegitimates because some illegitimate children, those living with their father's surviving wife instead of

with their mother, are eligible for the benefits, and some legitimate children, those living with foster parents instead of their mother, are ineligible. This argument equally ignores the effect of the marriage requirement. Only a tiny fraction of the illegitimate children of deceased workers live in families eligible for Mother's Benefits, for almost all such children live with their natural mothers.

More importantly, this Court has consistently held that discrimination against one subclass of illegitimates may be unconstitutional even though some illegitimates do not suffer from that discrimination. In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, this Court invalidated the Louisiana workers' compensation law that provided death benefits to both legitimate children and acknowledged illegitimate children but barred all benefits to unacknowledged illegitimates. One of the illegitimate children in Weber was born after the father's death and thus was never dependent on the father. But

because posthumously born legitimate children received a full share of workers' compensation, this discrimination was also held unconstitutional, this Court stating that "...a posthumously born illegitimate child should be treated the same as a posthumously born legitimate child..." 406 U.S. at 169 n.7. Weber thus illustrates that discrimination between even a class of only a small percentage of legitimate and illegitimate children similarly situated may be the basis for a constitutional violation.

Jimenez v. Weinberger, 417 U.S. 628 (1974), also illustrates this principle. The case involved Children's Benefits for children of disabled workers born after the onset of disability. All such legitimate children received benefits, as did illegitimate children who could inherit on intestacy from their father or whose illegitimacy resulted from a non-obvious defect in the parents' ceremonial marriage. Id. at 631 n.2. All other illegitimate children received no

benefits, regardless of whether they were living with or dependent upon their fathers. The classification was struck as unconstitutional discrimination based on illegitimacy. See also Davis v. Richardson, 342 F.Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069 (1972), and Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069 (1972), discussed infra at 49-51. In these cases too, some illegitimate children were unaffected by discriminatory treatment. Indeed, this is true in all Social Security claims because under the Act an illegitimate is deemed legitimate if his parents had entered into a good faith but invalid marriage. See 42 U.S.C. §416(h)(2)(B). Thus, in Weber, Jimenez, Griffin and Davis, there were some illegitimate children receiving the benefits in question, but the effect on other illegitimate children was found to be sufficient to establish that the classifications at issue were based on illegitimacy.

In sum, the marriage requirement of Section 202(g) discriminates on the basis

of illegitimacy. This discrimination is evidenced by the language of the statutory provision and its legislative history. Despite the Secretary's protestations, discrimination is also clear from the effect the statute has on illegitimate children living with their mothers. The District Court correctly concluded that the reality of the marriage requirement for Mother's Benefits is that it operates to exclude illegitimate children. J.S. App. 13a.

B. The Denial of Mother's Benefits to All Families of Illegitimate Children Living With Their Mothers Regardless of Actual Dependency When Benefits Are Afforded All Legitimate Children Similarly Situated Is Not Substantially Related to Any Legislative Purpose

1. The standard of review for the Section 202(g) classification is whether it bears a substantial relation to the governmental interest it was designed to serve

The Secretary properly concedes that "several of this Court's recent decisions suggest that in evaluating statutory classifications based on illegitimacy, a somewhat closer scrutiny than that traditionally

applied to laws regulating economic and social conditions may be appropriate." Appellant's Brief at 25. Nonetheless, the Secretary relies primarily on cases not involving illegitimacy at all. The distinction is of the essence. In the illegitimacy cases, this Court has made clear that although the strict scrutiny test is not applicable, illegitimacy is analogous in many respects to the personal characteristics that have been held to be suspect when used as the basis for statutory differentiation. The result has been the articulation of an intermediate standard of review between strict scrutiny and the traditional rational basis standard for classifications based on illegitimacy.[10]

For example, in Trimble v. Gordon, 430 U.S. at 767, this Court stated that

> [d]espite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny,"

[10] Classifications based on gender have been subjected to a similar intermediate standard. See, e.g., Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

> ...the scrutiny "is not a toothless one," [citing Mathews v. Lucas, 427 U.S. at 510], a proposition clearly demonstrated by our previous decisions in this area.

The Court then proceeded to make a detailed and careful analysis of the statutory purposes and whether they could be achieved without exclusion of illegitimate children.

The Court has followed this pattern of careful evaluation for the past eleven years,[11] as the opinion of the District Court demonstrates convincingly. See J.S. App. 20a-22a. Most illustrative is Jimenez v. Weinberger, 417 U.S. 628, in which discrimination against a class of illegitimates in Social Security benefits was held unconstitutional despite a strong argument that differential treatment was necessary to prevent spurious claims of paternity. In contrast to the decisions in cases not involving illegitimates,[12] Chief Justice

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11 See cases cited note 3, supra.

12 For example, in Social Security cases involving disparate treatment, general classifications not based on illegitimacy
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Burger's opinion for the Court closely examines the problem of spurious claims and finds they could be met without a blanket exclusion of a class of illegitimate children. Id. at 636.

Even in the cases in which the Court has upheld classifications related to illegitimacy, there is no question but that an intermediate standard of review between

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or gender have been upheld under a rational basis test. See, e.g., Califano v. Jobst, 434 U.S. 47, 53-54 (1977); Mathews v. De Castro, 429 U.S. 181, 185 (1976). The marriage rule at issue in Jobst was upheld because "general rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." 434 U.S. at 53. The rule at issue was therefore to be distinguished from those involving "merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group," id. at 54, citing Weinberger v. Wiesenfeld, 420 U.S. 636, involving sex discrimination, Jimenez v. Weinberger, 417 U.S. 628, involving discrimination against illegitimates, and Loving v. Virginia, 388 U.S. 1 (1967), involving racial discrimination.

strict scrutiny and rational basis has been applied, as, indeed, the Secretary concedes. Appellant's Brief at 26 n.20. See Lalli v. Lalli, plurality slip. op. at 5; Mathews v. Lucas, 427 U.S. at 513 (a statute "carefully tuned to alternative considerations.") In short, as this Court most recently articulated, the standard to be applied in illegitimacy cases is whether the statutory provision "bear[s] an evident and substantial relation to the particular [governmental] interests this statute is designed to serve." Lalli v. Lalli, plurality slip. op. at 8. The classification at issue in this case cannot meet this test.

2. Mother's Benefits are intended as benefits for the child and not as support for the deceased wage earner's spouse

The legislative history could not be more clear that the purpose behind Mother's Benefits is to provide children with the opportunity for the personal attention of their mother by relieving to some extent the need for her to go to work outside the home. Weinberger v. Wiesenfeld, 420 U.S.

636, 648-649. The Advisory Council which first recommended the adoption of Survivors' Benefits for children joined Children's and Mother's Benefits together as

> a program of survivors' insurance, intended primarily for the protection of the dependent orphans of deceased wage earners .... The council recommends that, in addition to benefits for such children, benefits be payable to widows who have in their care one or more of their children of the deceased wage earner. Such payments are intended as supplements to the orphans' benefits with the purpose of enabling the widow to remain at home and care for the children.

Final Report of the Advisory Council on Social Security 29, 31 (1938) (emphasis added).

At that time, Children's Benefits were limited to legitimate children, see discussion supra, pp. 20-21, so that Mother's Benefits at their inception were limited to widows and were even called "Widows' Current Benefits." This title was changed to Mother's Benefits in the 1950 amendment that provided Mother's Benefits to

surviving divorced wives and their children. Social Security Amendments of 1950, Pub. L. No. 81-734, §104(a), 64 Stat. 477. The change in title also reflected the purpose of the provision, to provide for the care of children. A new Advisory Council in 1971 "reiterated this understanding", stating:

> Present law provides benefits for the mother of young... children...if she chooses to stay at home and care for the children instead of working. In the Council's judgment, it is desirable to allow a woman who is left with the children the choice of whether to stay at home to care for the children or to work.

1971 Advisory Council on Social Security, Reports on the Old-Age, Survivors, and Disability Insurance and Medicare Programs 30 (1970), quoted in Wiesenfeld, 420 U.S. at 649. [13]

13 The fact that it is the mother and not the child that exercises the decision as to whether to accept Mother's Benefits and stay home to care for the child in no way detracts from the conclusion that the children, not the mother, are the intended

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Moreover, "[t]he whole structure of survivor's benefits conforms to this articulated purpose [care of children]," Weinberger v. Wiesenfeld, 420 U.S. at 650, but is inconsistent with the Secretary's contention that Mother's Benefits are designed to provide support for the wage-earner's spouse. First, the wife of a retired or deceased worker is not entitled to benefits under the Act until the wife reaches retirement age, despite the prospect of loss of support resulting from retirement or death of the husband. See 42 U.S.C. §§402(b)(1) and (e)(1). Congress expected the wife to support herself during her normal working life. Weinberger v. Wiesenfeld, 420 U.S. 636, 649-650. Wives and widows without children obtain

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beneficiaries of Mother's Benefits. It is of course the mother who decides what is best for her minor child. It is also the mother who decides how Children's Benefits are to be utilized--for food, housing, education, entertainment, etc. But the beneficiaries are nonetheless the children.

no benefits on the basis of their husband's earnings until they reach age 60, or in certain cases of disability, age 50. 42 U.S.C. §402(e)(1)(B). It is only when the care of children is present that benefits become available for the support of the mother of the children. Id. at 649-650. Moreover, Mother's Benefits cease when the child is no longer eligible for Children's Benefits or when the mother no longer has the child in her care or custody. 42 U.S.C. §402(g)(1)(E). Mother's Benefits also cease when the child reaches 18, although Children's Benefits may continue until age 22. 42 U.S.C. §402(s)(1). This statutory scheme led this Court in Wiesenfeld to conclude that:

> This distinction also sustains our conclusion that §402(g) was intended only to provide an opportunity for children to receive the personal attention of one parent, since mother's benefits are linked to children's benefits only so long as it is realistic to think that the children might need their parent at home.

420 U.S. at 651 n.17 (emphasis added).[14]

The provision of Mother's Benefits to surviving divorced wives further illustrates that Section 202(g) is not designed to provide support for the widow or divorced widow of the wage earner. In an earlier form, the statute provided Mother's Benefits only to surviving divorced wives who were receiving at least half their support from their former husband at the time of his

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14 Congress has similarly recognized elsewhere in the Social Security Act that an allowance of support for the mother is an integral part of benefits to a child. Originally, in the Aid to Families with Dependent Children program under Title IV of the Act, 42 U.S.C. §601 et seq., benefits were afforded only for the needs of the child and not the mother or other relative caring for the child. In 1950 Congress amended the statute to provide that the needs of the mother or other caretaker relative also be taken into account in computing benefits. This history is recounted in Rodriguez v. Vowell, 472 F.2d 622 (5th Cir.), cert. denied 412 U.S. 944 (1973), in which the court concluded that "the congressional purpose underlying the AFDC program was to assist dependent children by also meeting the needs of their caretaker relatives...." Id. at 625. The court noted, "[c]aring for a dependent child prevents the caretaker from working and, in the absence of other funds, the caretaker would be forced to share in the meager payments made to the child." Id.

death. Social Security Amendments of 1950, Pub. L. No. 81-734, §104(a), 64 Stat. 477. That requirement has been eliminated.[15] Although the legislative history of this change suggests that its intent was to ensure that surviving divorced widows received aid even when proof of dependency would be difficult because of nuances in state divorce and alimony laws, the effect of the amendment is that a divorced widow is eligible for Mother's Benefits even if she has never received any support for herself or her child from the father, indeed, even if the father was excused from any support obligations in the divorce proceedings. Such women and their children are eligible for Mother's Benefits, although no legal means by which support for the ex-wife may be obtained exists at the time of the death of the father.

For all these reasons, this Court in Wiesenfeld explicitly concluded that Mother's Benefits were intended as a benefit for the children. That conclusion was not, as the Secretary suggests, a mere oversight. An entire section of the opinion, Part III, Section B, some five pages, is devoted to the point and contains a detailed

15 Social Security Amendments of 1972, Pub. L. No. 92-603, §114(c), 86 Stat. 1348.

analysis of the statutory structure and legislative history. See 420 U.S. at 648-53. Its entire thrust is that Mother's Benefits were "intended only to provide an opportunity for the children to receive the personal attention of one parent since Mother's Benefits are linked to Children's Benefits only so long as it is realistic to think that the children might need their parent at home." Id. at 651 n.17. The ruling of the Court is aptly summed up in one sentence of Mr. Justice Rehnquist's concurring opinion:

> I believe the Court's examination [of the legislative history] convincingly demonstrates that the only purpose of §402(g) is to make it possible for children of deceased contributing workers to have the personal care and attention of a surviving parent, should that parent desire to remain in the home with the child.

420 U.S. at 655 (emphasis added).

3. Section 202(g) does not bear a substantial relation to the legislative purpose it was designed to serve

Given the statutory purpose of Section 202(g) to provide for the care of children,

it makes no sense to exclude an entire class of children living with their natural caretakers, their mothers, simply because the mother was never married to the father. If Congress had any purpose other than to discriminate against illegitimate children, it did not seek to achieve that purpose by a provision "carefully tuned to alternative considerations."[16]

The absolute bar to benefits to all illegitimate children living with their mother, without regard to whether they and their mother were actually being supported by their father at his death, is the clearest case of discrimination without any rational basis, and places this case squarely within the line of cases holding such discrimination unconstitutional. The contrast between Jimenez v. Weinberger, 417 U.S. 628, and Trimble v. Gordon, 430 U.S. 762, on the one hand, and Mathews v. Lucas, 427 U.S. 495, and

16 Mathews v. Lucas, 427 U.S. at 513; see also Trimble v. Gordon, 430 U.S. at 772.

Lalli v. Lalli, No. 77-1115, illustrates the point. Both Jimenez and Trimble involved an absolute bar to Social Security benefits or intestate inheritance for children whose mothers had never married their fathers. In Lucas and Lalli, on the other hand, illegitimate children who established paternity or support in the manner prescribed by statute qualified for inheritance or Social Security benefits.[17]

Jimenez v. Weinberger involved the denial of Social Security benefits to certain illegitimate children of a disabled insured worker born after the onset of the disability. After-born legitimate children and certain classes of after-born illegitimate children received Children's Benefits, but other after-born illegitimate children were barred from benefits, regardless of whether they were living with or dependent on the insured. This

17 This demonstrates that the Secretary's contention, Appellant's Brief at 31, that Lalli involved an absolute bar to inheritance is factually incorrect and misstates the issue, which is whether the loss of benefits is related solely to the marital status of the parents, as here, or to some other factor.

Court found that the statute was both overinclusive by granting benefits to children not dependent on the insured and underinclusive by denying benefits to some illegitimate children who were actually dependent on the insured. It concluded:

> ...hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.

417 U.S. at 637.

The classification established by Section 202(g) is precisely the same because it results in a total exclusion of all illegitimates living with their mothers from Mother's Benefits and the inclusion of all identically situated legitimate children, regardless of dependency. The only difference between the two groups is the marriage of the parents, or lack thereof. It is precisely this absolute bar based on a marriage requirement that this Court found to be per se irrational and hence unconstitutional in Jimenez.

See also Trimble v. Gordon, 430 U.S. at 770-771, referring to the need "to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity," and Lalli v. Lalli, plurality slip op. at 7.

In contrast, the requirement at issue in Mathews v. Lucas, 427 U.S. 495, that certain illegitimates prove dependency to receive Children's Benefits, involved only overinclusion, not underinclusion, because "any otherwise eligible child may qualify for survivorship benefits by showing contribution to support or cohabitation, at the time of death." Id. at 512. Unlike here, the disfavored class had the opportunity to qualify for benefits by proving dependency.[18]

[18] The effect of the statutory provision involved in Lucas on illegitimate children has been greatly reduced by this Court's decision in Trimble v. Gordon, 430 U.S. 762, because statutes that bar all illegitimates from intestate inheritance are now unconstitutional. Illegitimate children now inherit on intestacy in such states and are therefore eligible for Children's Benefits without proof of dependency. See Mathews v. Lucas, 427 U.S. at 499.

Similarly, in Lalli v. Lalli, involving a requirement that a child's paternity be declared in judicial proceeding sometime before the father's death before the child could inherit through intestacy, there was no blanket exclusion of illegitimates. As this Court stated, "The marital status of the parents is irrelevant. The single requirement...is an evidentiary one." Plurality slip op. at 7. The requirement was then upheld as a reasonable method of avoiding spurious claims of paternity.

This case might be an entirely different one if Congress had merely created a presumption of dependency arising from legitimacy. It appears that Lucas and Lalli would allow Congress to grant Mother's Benefits to all legitimate children and their mothers without actual proof of dependency but require illegitimate children and their mothers to prove dependency. But Congress has gone further and created an absolute bar to receipt of benefits to all illegitimates living with their mother.

The Secretary, relying primarily on Lucas, argues throughout his brief that the marriage requirement creates a valid

classification because it relates to a likelihood of support of the widow by the father. But Lucas itself made clear that the likelihood of support was justified only to the extent of requiring proof of dependency by illegitimates but not by legitimates. This Court noted in Lucas that in its prior illegitimacy decisions "[u]nder all but one of the statutes, not only was the legitimate child automatically entitled to benefits, but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy, and regardless of any demonstration of dependency or other legitimate factor". 427 U.S. at 511. The one exception referred to was Weber v. Aetna Casualty Surety Co., 406 U.S. 164, which along with Davis v. Richardson, 342 F.Supp. 588 (D. Conn.), aff'd mem., 409 U.S. 1069, and Griffin v. Richardson, 346 F.Supp. 1226 (D. Md.), aff'd mem., 409 U.S. 1069, involved provisions of the Louisiana workers' compensation law and the Social Security Act which provided that if total benefits exceeded the maximum allowable, all benefits to illegitimate children would be reduced first, without any reduction for legitimates. These

cases rejected the very same argument that the likelihood of support for legitimate children renders reduction of benefits only against illegitimates constitutionally permissible.[19]

Weber, Davis and Griffin also expressly reject the Secretary's contention that possible reduction in benefits to the legitimate

19 Similarly, Weinberger v. Wiesenfeld, 420 U.S. 636, involving gender, struck down discrimination in Social Security benefits even though it rested on the notion that "men are more likely than women to be the primary supporters of their spouses and children, [a notion] not entirely without empirical support." Id. at 644-45. In contrast, in Mathews v. De Castro, 429 U.S. 181, which did not involve sex discrimination but rather a classification distinguishing wives from divorced wives, this Court rested its decision on the fact that "Congress could have rationally assumed that divorced husbands and wives depend less on each other for financial and other support than do couples who stay married." Id. at 188. In sharp contrast to the situation here where the very purpose of the Mother's Benefits is to permit the mother to stay home and care for the child, this Court emphasized in De Castro that "a divorced wife need not forgo work in order to stay at home to care for her disabled [ex]husband." Id.

children because of the maximum benefits limit can justify denial of benefits to illegitimate children as a sort of rational rationing process designed to allocate limited resources to "those categories of beneficiaries most likely to have suffered economically from the wage earner's death." Appellant's Brief at 28. The very same argument was made by the Secretary to justify the statutory provisions in those cases which allocated limited resources for Survivors' Benefits first to legitimate children and secondarily to illegitimates. See, e.g., Griffin v. Richardson, 346 F.Supp. at 1226. These arguments were rejected by this Court in its summary affirmance of Davis and Griffin and by the statement in Weber that "[a]n unacknowledged illegitimate child may suffer as much from the loss of a parent as a child born within wedlock or an illegitimate later acknowledged." 406 U.S. at 169. That is why the opportunity to prove dependency has been stressed by this Court.

Furthermore, the absolute denial of the care made possible by Mother's Benefits

to illegitimate children because of the marriage requirement applicable to their mother operates as a bar even if there are no other children of the father or any other person receiving Survivors' Benefits on his account. This illustrates that the marriage requirement was not intended to perform a "rationing" function, and in any event, operates in an overly broad, irrational manner.[20] It is a far cry from being "carefully tuned

[20] The Secretary's suggestion that the size of the Mother's Benefit decreases as the number of entitled children increases, Appellant's Brief at 21, is inaccurate and misleading. As the example cited shows, id. at n. 22, Mother's Benefits, like all other benefits, are reduced proportionately only when the maximum benefit payable on the account of a wage earner is reached. The same reduction applies to Children's Benefits and was expressly held by this Court not to justify an exclusion of illegitimate children in Davis and Griffin. Moreover, the fact that Congress established a maximum which results in benefits that fall short of achieving the full statutory purpose of providing

to alternative considerations", as required by this Court. Mathews v. Lucas, 427 U.S. at 513.

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for children does not provide a constitutional basis for discrimination against illegitimate children. There is no permissible basis to require that even without an opportunity to show dependency, illegitimates must suffer more than legitimates. The same argument was rejected by Weber, Davis and Griffin.

II

THE SOCIAL SECURITY ACT AUTHORIZES THE DISTRICT COURT TO AWARD RETROACTIVE BENEFITS WHEN THERE HAS BEEN AN INCORRECT DENIAL OF BENEFITS, RESULTING FROM THE APPLICATION OF AN UNCONSTITUTIONAL CONDITION ON BENEFITS

Section 204(a) of the Social Security Act requires the payment of retroactive benefits to anyone who has received "less than the correct amount" of benefits by directing that "the Secretary shall make payment of the balance of the amount due such underpaid person." 42 U.S.C. §404(a). The Secretary concedes that this provision "authorizes a court to order the Secretary to pay retroactive benefits" in cases in which the Secretary has "misinterpreted" or "misapplied" the statute, but not in cases in which benefits have been incorrectly withheld because of the unconstitutionality of a statutory provision. Appellant's Brief at 35. In essence, his argument is that Section 204(a) constitutes a waiver of sovereign immunity for statutory

but not constitutional claims.[21] An examination of both the plain language of the statute and this Court's precedents establishes that this argument is wholly without merit.

The Secretary does not and cannot cite any decision holding that sovereign immunity precludes federal courts from granting recipients and applicants an opportunity to recover Social Security benefits denied pursuant to an unconstitutional statutory requirement. Indeed, numerous decisions approve such relief. See, e.g., Goldfarb v. Secretary of Health, Education and Welfare, 396 F. Supp. 308, 309 (E.D. N.Y. 1975), aff'd sub nom. Califano v. Goldfarb, 430 U.S. 199 (1977); Wiesenfeld v. Weinberger, 367 F. Supp. 981, 991 (D. N.J. 1973), aff'd, 420 U.S. 636 (1975); Griffin v. Richardson, 346 F. Supp. 1226, 1237 (D. Md.), aff'd mem., 409 U.S. 1069 (1972). See also Jimenez v.

21 This Court may decline to consider this argument since it was not raised in the Court below. See Dothard v. Rowlinson, 433 U.S. 321, 323 n.1 (1977); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970); Tyrrell v. District of Columbia, 243 U.S. 1 (1917).

Weinberger, 523 F.2d 689, 704 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). These decisions reflect the statutory language of Section 204(a) which makes no distinction between constitutional and statutory reasons for a payment that is less than correct. The pertinent question is thus not, as the Secretary would have it, whether Congress intended plaintiffs to have Mother's Benefits. The question is whether Congress in authorizing suits to recover Social Security Benefits incorrectly withheld has excluded recovery of retroactive benefits when the error was reliance on an unconstitutional prerequisite for benefits. Such an exclusion would have to be implied, because there is nothing in Section 204(a) which even suggests such a result.

Moreover, the relationship between Sections 204(a) and 205(g) and (h), 42 U.S.C. §§405(g) and (h), demonstrates the intent of Congress to allow the district courts to award retroactive benefits whether the underpayment rests on a statutory error or the application of an unconstitutional condition on benefits. Sections 205(g) and (h) authorize suits in the district courts to review denials of claims by the Secretary.

This Court held in Weinberger v. Salfi, 422 U.S. 749 (1975) that "the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions." Thus the plain words of the third sentence of §405(h)[22] do not preclude constitutional challenges. They simply require that they be brought under jurisdictional grants contained in the Act, and thus in conformity with the same standards which are applicable to nonconstitutional claims arising under the Act." Id. at 762 (emphasis added). In essence, the Social Security Act treats constitutional and statutory claims for benefits alike. There is simply no reason to read into Sections 204(a) and 205(g) and (h) an exclusion for retroactive

[22] 42 U.S.C. §405(g) provides for review of the final decision of the Secretary by a civil action filed "in the district court of the United States for the judicial district in which the plaintiff resides... ." The third sentence of Section 405(h) states:

> No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

benefits payable to an applicant who meets every constitutionally valid eligibility requirement for benefits but has been denied them because of unconstitutional eligibility requirements.[23]

Indeed, the Secretary himself has interpreted the review scheme under the Social Security Act as authorizing full monetary relief, even in cases of denial of benefits due to an unconstitutional statutory condition. In Norton v. Mathews, 427 U.S. 524 (1976), the appellants claimed that they were denied Children's Benefits based on

23 The express provisions in Title II of the Social Security Act authorizing payment of retroactive benefits and suits to review denials of benefits distinguishes this case from Edelman v. Jordan, 415 U.S. 651 (1974), involving a different title of the Social Security Act providing for public assistance benefits, which title did not contain any explicit provision either for retroactive benefits or for judicial review of the denial or underpayment of benefits. 415 U.S. at 674. Moreover, Edelman involved special considerations of federalism, not applicable here, because the assertion of immunity was by a state under the Eleventh Amendment. Jimenez v. Weinberger, 523 F.2d 689, 704 n.33 (7th Cir. 1975), cert. denied 477 U.S. 912 (1976).

unconstitutional eligibility rules. In his brief in Norton, the Secretary, in arguing against the need for injunctive class relief ordering payment of benefits, stated that under the Act

> [i]f the claimant's contentions, constitutional or otherwise, are sustained, a judgment by the district court may reverse the decision of the Secretary and order the payment of benefits (or reconsideration of the claim under the proper standards). An order reversing the Secretary's decision and requiring payment of benefits is tantamount to the entry of a money judgment in the plaintiff's behalf and provides him with full compensation for his claim....

Brief for Appellee, Norton v. Mathews, at 21 (emphasis added). The Secretary made no distinction between prospective and retroactive benefits, nor could he, for relief requiring the payment of benefits does not provide a claimant with "full compensation for his claim" unless it includes the payment of retroactive benefits.

The Secretary relies on three cases involving claims for damages for denial of due process which, despite his characterization of them, are consistent with the

claims in this case. See De Lao v. Califano, 560 F.2d 1384 (9th Cir. 1977); Tatum v. Mathews, 541 F.2d 161 (6th Cir. 1976); Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976). In these cases, plaintiffs asserted a violation of due process in the termination of their Supplemental Security Income disability benefits without a prior hearing. The claim asserted and upheld was the denial of the hearing. With respect to retroactive benefits, the plaintiffs claimed that even those persons found ineligible after a hearing should receive benefits for the period between the original termination and the hearing. The courts, however, found that Congress had authorized retroactive payments only to those found eligible after a hearing and not to those found not eligible. See De Lao v. Califano, 560 F.2d at 1391; Tatum v. Mathews, 541 F.2d at 166 n.5; Johnson v. Mathews, 539 F.2d at 1125. The result in these three cases actually supports retroactive benefits here. In each of the three, all plaintiffs who established eligibility after a hearing were awarded full retroactive benefits

under the authority of §1631(b) of the Social Security Act, 42 U.S.C. §1383(b), the provision of the Supplemental Security Income title which is comparable to §204(a) of the Act. De Lao, 560 F.2d at 1389; Tatum, 541 F.2d at 166 n.5; Johnson, 539 F.2d at 1125. Similarly, in this case, appellees are eligible for Mother's Benefits, but for the marriage requirement.[24]

Equitable considerations also support an award of retroactive payments to appellees. In this case, and in virtually every instance in which Social Security benefits are unlawfully withheld, an award of retroactive payments restores the injured beneficiaries to the position they would have been in had the Secretary not violated the law, whether that law is the federal statute or the federal Constitution. The importance of such restitution should particularly not be overlooked here when all that is involved

[24] Insofar as the decisions in De Lao, Johnson and Mathews denied retroactive benefits to those found not eligible on the grounds of sovereign immunity, appellees suggest those decisions were incorrect even though distinguishable.

by way of monetary relief is a few thousand dollars,[25] an amount that is inconsequential to the government but of great value to the affected individuals.

25 Only the two named plaintiffs were awarded retroactive benefits by the District Court; the class relief was limited essentially to notice to class members that they may now be eligible for benefits. See discussion infra pp. 63-66.

III

WHERE THE ACTION DID NOT SEEK RECOVERY OF SOCIAL SECURITY BENEFITS FOR MEMBERS OF THE CLASS, THE DISTRICT COURT HAD AUTHORITY TO AWARD CLASS RELIEF WHICH IS LIMITED IN EFFECT TO A NOTICE TO CLASS MEMBERS OF THE REMOVAL OF THE UNCONSTITUTIONAL MARRIAGE REQUIREMENT

A. The Class and the Limited Nature of the Class Relief Awarded

The District Court certified this case "as a class action on behalf of a class consisting of all illegitimate children and their mothers who are presently ineligible for Mother's Insurance Benefits solely because 42 U.S.C. §402(g)(1) restricts such benefits to women who were once married to the fathers of their children." J.S. App. 1a-2a. The members of the class thus are all in the same position as the named appellees, Norman J. Boles and his mother, Margaret Gonzales.

Unlike the relief granted the named plaintiffs, however, the Court did not order the payment of any benefits to the named class. Indeed, the complaint was amended, in recognition of the limitations imposed by Weinberger v. Salfi, 422 U.S. 749 (1975), to delete any claim for benefits.

Rather the relief awarded the class was twofold: (1) declaratory and injunctive relief and (2) notice to the class of their potential eligibility for Mother's Benefits.

The District Court first declared Section 202(g)(1) unconstitutional and enjoined the Secretary "from denying benefits to Plaintiffs and the Plaintiff Class on the basis of the marriage requirement declared unconstitutional herein." J.S. App. 24a. The Secretary has agreed "that this particular class relief no longer will have any practical effect, for this Court's decision will control the Secretary's interpretation of Section 202(g)(1) as applied to all class members." Appellant's Brief at 38 n. 30. Accordingly, the only relief for the class which is in question here is the second category of relief, namely the notice to the class.

The District Court ordered that

> The Defendant [Secretary] notify all illegitimate children receiving Child's Insurance Benefits and their mothers that they are no longer ineligible for Mother's Insurance Benefits solely by reason of the marriage requirement declared invalid herein and that they may apply for such benefits.

J.S. App. 25a.[26] The order is limited to

26 The District Court's order is practical in that it limits the notice to families already receiving Social Security benefits. It now appears that most of these families can be identified through the Social Security Administration's computers. As a result of an inquiry by counsel for appellees, the Secretary has undertaken an investigation to determine whether his brief (at 38 n. 30) was accurate in stating that the computers and tapes do not reflect whether recipients of Children's Benefits are illegitimate. The Solicitor General has now informed counsel for appellees that many of the illegitimate children receiving Child's Benefits can be identified by computer, and he will further advise the Court when filing his reply brief. In any event, notice to the class is appropriate even though not every member will actually receive it. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). There is no reason to deny this relief to most class members merely becuase the government's computer facilities are inadequate to identify every single class member.

The question of the practicalities of giving notice is, moreover, one for the District Court to consider in the first instance. It was never raised there by the Secretary and should not be considered for the first time on appeal. See Ryan v. Shea, 525 F.2d 268, 275 (10th Cir. 1975), and also cases cited, supra, n. 21. Indeed, the confusion on the part of the Secretary about the practicalities of compliance demonstrates the need for an evidentiary hearing as to any claim by him that the notice requirement is burdensome.

notice to the class of their potential eligibility, a notice vital to prevent continued loss of benefits to tens of thousands of now-eligible families with illegitimate children. No payment of benefits is ordered. Indeed, the order recognizes that each claimant in the class will be required to apply for benefits and meet all the eligibility requirements save the marriage requirement. The assertion of the Secretary that he "not only must notify the class of eligibility but must grant any claim for benefits" and that "any defense to non-payment" is "cut off," Appellant's Brief at 39, is palpably incorrect.

B. The Necessity for the Order

The District Court's order for notice to the class seeks to prevent the continued loss of benefits to primarily low-income families[27] who have previously been advised by the Social Security Administration that they are not eligible for Mother's Benefits. Without the notice ordered by the District Court they will have no way of learning that

27 As a result of the provision for reduction in benefits by reason of earnings from employment, see 42 U.S.C. §403(b), most members of the class with earnings over $9000 would not receive benefits.

they may no longer be ineligible and that they should apply for benefits. The Social Security Administration cannot pay benefits in the future to those families that have been unconstitutionally denied benefits in the past unless they apply, for the Act specifically requires the mother to apply as a condition of benefits. 42 U.S.C. §402(g)(1)(D).

An examination of the actual operation of the application process for Social Security benefits reveals the need for notice to the class. When the father of a child dies, the mother goes to the Social Security office to apply for "benefits." Although she, like the public, may know that one can obtain benefits when the father of a child dies, she, like most of the public, is not aware of the many kinds of benefits or the varying eligibility requirements. For those technical matters the applicant relies on the interviewer or other employee of the Social Security Administration.

When the interviewer learns that the mother had never been married to the father of the child, any consideration of Mother's Benefits is ended, for a statutory requirement cannot be met. It is not the function

of the Social Security Administration to decide the constitutionality of the Act. See Weinberger v. Salfi, 422 U.S. at 764. The mother may never even be told of the existence of the Mother's Benefits. If she has heard of such benefits, or is told of them, she also is informed that she is ineligible. If she has any questions she can be shown the law or the summaries of the law used by the Social Security Administration, and can verify for herself that she is ineligible, for she clearly is not a "widow" or "surviving divorced mother." With rare exceptions, that is the end of the matter for the mothers in the plaintiff class. Many may feel very satisfied, for their child has been awarded Children's Benefits. None of the mothers may realize that they have been unconstitutionally denied Mother's Benefits.

Obviously few members of the class read legal literature. Rarely do mothers of illegitimate children seek legal advice as a result of denial of Mother's Benefits. Generally the denial seems to be correct on the face of it, and these mothers could hardly be expected to seek legal advice about constitutional challenges. Appellee Gonzales sought legal advice only because she believed

she was the common law wife of the deceased wage earner.[28] Counsel believes this case was the first ever brought to challenge the constitutionality of the marriage requirement for Mother's Benefits, and that only a handful of cases have been brought since the decision of the District Court herein. Yet there are in excess of 100,000 illegitimate children receiving Children's Benefits, according to an estimate received from the Social Security Administration.

In sum, the District Court's order of notice to the class was a simple, expedient way of ensuring that the unconstitutional denial of Mother's Benefits does not continue. Indeed, it is the only way that denial will end.

C. Jurisdiction to Require Notice to the Class is Afforded by 28 U.S.C. §1331

Because the claim of the plaintiff class arises under the Constitution of the United States, 28 U.S.C. §1331 grants jurisdiction to the District Court to hear the case. That jurisdiction has not been removed by Section 205(h) of the Social Security Act, 42 U.S.C. §405(h), as interpreted in

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28 The contention was rejected by the Administrative Law Judge and thereafter abandoned by appellees.

Weinberger v. Salfi, 422 U.S. 749. As already noted, the District Court's relief as to the class is limited to a notice. Section 205(h) applies only to claims for benefits.

Section 205(h) provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

The Court has described Salfi as holding that this section "precludes federal-question jurisdiction in an action challenging denial of claimed benefits." Mathews v. Eldridge, 424 U.S. 319, 327. This limitation is required by the express language of the last sentence of 205(h), which refers to actions "to recover on any claim arising under this subchapter." The claim referred to means a claim for Social Security benefits, which is what "this subchapter" of the Social Security Act is all about. Salfi, 422 U.S. at 762.

Section 205(h) is the corollary to Section 205(g), 42 U.S.C. §405(g), and only bars actions which can reach the courts under the review provisions of subsection (g). Section 205(g) provides for judicial review in the district courts of "any final decision of the Secretary made after a hearing." The second and third sentences of Section 205(h) bar review of the Secretary's findings of fact and decisions "except as herein provided," i.e., in 205(g), and bar actions under Section 1331 to recover "on any claim arising under this subchapter." The hearing and final decision referred to in Sections 205(g) and (h) are those provided in the case of claims for Social Security benefits. In Mathews v. Eldridge this court noted that "[a]s construed in Salfi, §405(g) requires only that there be a 'final decision' by the Secretary with respect to the claim of entitlement to benefits." 424 U.S. at 329. No person could file a "claim" under the Social Security Act asserting that the Secretary should give notice to the class of the end of the unconstitutional marriage requirement or obtain an administrative hearing on such a request or judicial review

under Section 205(g). But for that very reason, and because the relief granted the plaintiff class is not a "claim" under the Social Security Act, it is also not barred by Section 205(h).

The Secretary seeks to gloss over what he concedes -- that "appellees ultimately sought only to require the Secretary to notify the class of eligibility," Appellant's Brief at 39 -- by focusing on the complaint as originally filed. Id. But plaintiffs amended the complaint to remove any claim for benefits for the class. See Appellant's Brief, App. at 3a-3b. More importantly, what is determinative of the District Court's jurisdiction here is not what the plaintiff said in a pleading but the relief actually awarded; that relief was limited to notice. The relief granted is of the essence, for this Court emphasized in Salfi that "[a]ppellees sought, and the District Court granted, a judgment directing the Secretary to pay Social Security benefits." 422 U.S. at 761 (emphasis added). That is simply not this case.

It is also incorrect to assert, as the Secretary has, that allowing jurisdiction to afford the limited relief necessary in the

special circumstance here to prevent a forfeiture of benefits will create "odd" patterns of judicial review. Appellant's Brief at 39-40. Upholding the District Court's jurisdiction under Section 1331 to fashion a notice remedy will not allow persons who have not filed a claim with, or obtained a decision from, the Secretary to litigate the validity of the Social Security Act. One who has not been denied benefits by the Secretary solely on the grounds that are alleged to be unconstitutional could not properly represent a class of individuals who have been denied benefits solely on constitutional grounds, for it might be speculative as to whether the named plaintiff would ever benefit from a favorable ruling. See Fed. R. Civ. P. 23(a)(3 and 4) and (b)(2).

Salfi should not be given an overly broad application to bar the relief afforded the class here. As the opinion makes clear, the decision rests on the specific language of Section 205(h) and the result is contrary to the general rule that administrative remedies need not be exhausted when exhaustion would be futile. 422 U.S. at 757-62. The unusual restrictive language of Section 205(h)

should be limited to the claims for benefits to which Congress intended it to apply.

This Court and the lower federal courts have not hesitated to either waive the exhaustion requirements of Section 205(g) or to find that they were inapplicable when a rigid application of Salfi would have prevented effective relief, particularly when constitutional claims are involved. The exhaustion requirement has been deemed waived when there was a great interest in prompt resolution of the plaintiff's constitutional claim because further delays would cause irreparable harm due to a continued denial of benefits. Mathews v. Eldridge, 424 U.S. 319 (1976). See also Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Mattern v. Mathews, 582 F.2d 248 (3d Cir. 1978).

Based on the decision in Mathews v. Diaz, 426 U.S. 67 (1976), finding a waiver of exhaustion, the courts have also held that no further exhaustion was required because the Secretary had the opportunity to determine that the only remaining issue with regard to all the class members was the constitutionality of a statutory eligibility rule. Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976). The requirement has also been waived based on a finding that the Secretary made a determination with regard to the named plaintiff which was applicable to all similar cases, and thus it would be a waste of judicial and administrative resources to require multiple exhaustion of remedies. Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977). Finally, some courts have simply found that the requirements of Section 205(g) were inapplicable. In these cases, the courts have held that the third sentence of Section 205(h) does not bar mandamus jurisdiction over a procedural claim, either under the statute or the Constitution, which is "collateral" to the claim for entitlement to benefits. Barnett v. Califano, 580 F.2d 28 (2d Cir. 1978); Elliot v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), cert. granted, No. 77-1511 (Oct. 2, 1978); White v. Mathews, 559 F.2d 852 (2d Cir. 1977); Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975).

All of these cases reflect a concern that an overly broad application of Salfi will result in the federal courts' unavailability

for the redress of constitutional rights. They look to the reality of the situation and conclude that the jurisdiction of the federal courts is needed to provide class relief to prevent injustices which would otherwise occur. That very situation is now before this Court. If this Court affirms on the merits, the victory will be a hollow one for the tens of thousands of families in the plaintiff class who will not learn of the decision or even receive the benefits which they need and to which they are entitled by law, unless the Secretary is required to give them notice. It was, after all, the Secretary who informed them in the first instance that they were ineligible. He should be required to correct that error.

D. Injunctive Class Relief May be Afforded Under Section 205(g) of the Social Security Act if Unavailable Under 28 U.S.C. §1331

The Secretary has asserted that injunctive relief is not authorized for the class in cases brought under Section 205(g) by incorporating herein his brief in Califano v. Elliot, cert. granted, No. 77-1511. Since that case has already been argued, appellees similarly refer the court to the argument

of respondents in their brief in the Elliot case on this point, pp. 69-74, adding only that at least five courts of appeals have approved class action injunctive relief under Section 205(g).[29] The Secretary does not cite, and counsel for appellees have not found, any contrary decisions in the courts of appeals.

If 28 U.S.C. §1331 does not provide jurisdiction for the limited class relief awarded by the District Court, then such relief is authorized by Section 205(g) of the Social Security Act, 42 U.S.C. §405(g). The only reason that Section 1331 jurisdiction might not be available would be that the relief granted the class was a claim under the Social Security Act. Such claims are reviewable in the district courts under Section 205(g) if administrative remedies have been exhausted or exhaustion is not required. Mathews v. Eldridge, 424 U.S. 319. These requirements have been met here.

In Mathews v. Eldridge this Court held

[29] Jones v. Califano, 576 F.2d 12 (2d Cir. 1978); Elliot v. Weinberger, 564 F.2d 1219, (9th Cir. 1977), cert. granted, No. 77-1511 (Oct. 2, 1978); Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977); Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

that the exhaustion requirement of Section 205(g) "consists of two elements, only one of which is purely 'jurisdictional' in the sense that it cannot be 'waived'.... The non-waivable element is the requirement that a claim for benefits shall have been presented to the Secretary." 424 U.S. at 328. Exhaustion of the remainder of the administrative process may be waived by the Secretary. Id.

The class relief awarded by the District Court requires notice only to "all illegitimate children receiving Child's Insurance Benefits and their mothers." J.S. App. 25a. As demonstrated above, this means that all members of the plaintiff class have in fact filed a claim for Mother's Benefits. As noted, the reality of the application process is that each member of the class sought whatever benefits were available on the death of the father. Those claims actually filed included Mother's Benefits, or would have were it not for the unconstitutional marriage requirement. All class members completed an application form for Children's Benefits and some undoubtedly filled out an application for Mother's Benefits, as appellee Gonzales did here. Others filled out a form only for

Children's Benefits because employees of the Social Security Administration either did not advise claimants of the existence of Mother's Benefits or advised them of their ineligibility, in effect denying the application. See supra, pp. 67-68. Thus each member of the class met the requirement of having filed a claim for Social Security benefits arising from the account of the deceased father.

The remaining steps in the administrative process (the waivable portion) need not be exhausted for the District Court to exercise jurisdiction. This Court's decisions in Mathews v. Diaz, 426 U.S. 67, and Mathews v. Eldridge, 424 U.S. 319, illustrate the two categories of circumstances in which the requirement of exhaustion has been deemed waived, both of which apply here.

First, Diaz holds that exhaustion is waived when the Secretary concedes that there are no factual disputes and only a constitutional issue is presented, the situation here. In Diaz, not even the named plaintiffs in the class action had completely exhausted available avenues for administrative review, but the Secretary conceded that as to two

named claimants there were no disputed issues of fact and their applications should be treated as final for the purposes of the litigation. 426 U.S. at 72-73. As to another claimant, the Secretary did not make this concession but acknowledged that his claim could not be allowed under the statute as the sole remaining issue was constitutional. "As in Salfi, th[e] constitutional question is beyond the Secretary's competence." Id. at 76. This Court found that these stipulations by the Secretary constituted a waiver of the exhaustion requirement. Id. at 77.

The situation is similar here for there are no disputed issues of fact and the sole issue is a constitutional one. The Secretary necessarily had to deny the claims of all other class members because they had not met the marriage requirement. Here, as in Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3d Cir. 1977), although there has not been exhaustion by each class member of every step of the administrative process, the Secretary has "taken a final position in one of them...at the highest administrative level, on a legal issue common to all class members." Id. at 344. The Third Circuit

added that "[r]equiring multiple exhaustion on the same issue would involve the same commitment of administrative resources unsupported by any administrative or judicial interest' that Justice Rehnquist so aptly condemned in Salfi." Id. at 345. Similarly, in Wilson v. Edelman, 542 F.2d 1260 (7th Cir. 1976), the court held that by filing a motion for summary judgment (as the Secretary did here), "the [Secretary] necessarily contended that there were no material issues of fact in dispute." Id. at 1272. Acknowledging Salfi's concern for safeguarding against judicial review of unnecessary constitutional issues, id. at 1273, the court nevertheless found that when the Secretary acknowledges that the only issue is a constitutional one beyond the power of the Secretary to determine, Salfi is not a bar to a suit. It concluded that "Salfi did not...intend to permit the Secretary to object to Section 405(g)'s exhaustion requirement purely for the purpose of defeating jurisdiction." Id. So too, here, the Secretary's assertion of Salfi as a bar is solely to prevent the District Court from requiring notice to the class, for there are no issues which the Secretary himself

could determine relating to that notice. On the contrary, the notice will provide the opportunity for adjudication of claims by the Secretary by advising the members of the class of their right to file claims for benefits.

Second, Mathews v. Eldridge, 424 U.S. 319, holds that exhaustion is unnecessary when the delay involved would cause irreparable harm and there is no direct claim for benefits. Failure to grant notice to the plaintiff class here causes irreparable harm because some class members will never learn of their right to benefits and others will learn of it only after years of delay. There is no occasion for Social Security recipients to visit a Social Security office once benefits have begun. The members of the plaintiff class receive their checks for Children's Benefits in the mail. Only a personal notice will advise them of their right to apply for Mother's Benefits.[30]

[30] In the analogous situation of welfare benefits, this Court upheld as constitutional the determination of the lower courts that a notice of possible eligibility for benefits improperly withheld is appropriate. Quern v. Jordan, No. 77-841 (Mar. 5, 1979).

As in Jimenez v. Weinberger, 523 F.2d 689, 694, cert. denied, 427 U.S. 912, the District Court properly recognized the necessity for notice to the class.

E. The Certification of a Nationwide Class Was Within the Discretion of The District Court and Should Not Be Disturbed Here

The District Court's determination that a notice should be given to all potential claimants who had been unconstitutionally denied Mother's Benefits was within the discretion of the District Court and should not be disturbed. Bermudez v. United States Department of Agriculture, 490 F.2d 718 (D.C. Cir.), cert. denied, 414 U.S. 1104 (1973). In similar cases the courts have certified a nationwide class in order to prevent a loss of benefits. See, e.g., Bermudez v. United States Department of Agriculture, supra; Elliot v. Weinberger, 564 F.2d 1219 (9th Cir.), cert. granted, No. 77-1511 (Oct. 2, 1978); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir.), cert. denied, 427 U.S. 912.

The arguments advanced by the Secretary against a nationwide class in his brief in Elliot v. Califano, No. 77-1511, pp. 75-76, have no applicability to this case in which the merits of the dispute are before this Court

for determination. The Secretary did not raise any objection to the nationwide scope of the class in the District Court. The Secretary now argues that certification of a nationwide class forecloses the opportunity for debate in the lower courts. But whatever validity such an argument might have had in the District Court is lost once the District Court has decided this case on the merits and the issue is before this Court. The decision here will settle the merits on a nationwide scale.

If this Court affirms on the merits, a nationwide class is necessary to provide all newly eligible members of the class with notice that they may now apply for Mother's Benefits. Such relief is necessary to realize in practice the objective of Rule 23(b)(2), Fed. R. Civ. P., equal treatment of parties similarly situated.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

HERBERT SEMMEL
NANCY DUFF CAMPBELL

Center for Law and
Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670

On the Brief:

Marcia D. Greenberger
Dennis P. Walsh*
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D.C. 20036
(202) 872-0670)

*Law Student Intern